

Karen Gregory

From: Mary Angel on behalf of Secretary
Sent: Tuesday, August 23, 2005 2 24 PM
To: Bryant VanBrakle; Karen Gregory, Rebecca Fenneman
Subject: FW Docket No 05-05
Attachments: nvo pdf, DOT Comments doc

FYI

From: Paul.Smith@dot.gov [mailto:Paul.Smith@dot.gov]
Sent: Tuesday, August 23, 2005 10:11 AM
To: Secretary
Subject: Docket No. 05-05

Dear Mr VanBrakle

Pursuant to the recent Notice of Proposed Rulemaking in the above-referenced docket, 70 FR 45629 (August 8, 2005), attached herewith please find the Comments of the United States Department of Transportation in both Microsoft Word and pdf format

Please contact me if you have any questions, and thank you for your assistance

Paul Samuel Smith
Senior Trial Attorney
U S Department of Transportation

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BEFORE THE
FEDERAL MARITIME COMMISSION

Non-Vessel-Operating Common
Carrier Service Arrangements

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Docket No. 05-05

COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

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Dated: August 23, 2005

BEFORE THE
FEDERAL MARITIME COMMISSION

Non-Vessel-Operating Common)	
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COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

In a Notice of Proposed Rulemaking ("NPRM") issued on August 3, 2005, the Federal Maritime Commission ("FMC" or "Commission") has proposed changes to its exemption for non-vessel-operating common carriers ("NVOCCs") from tariff publication and adherence requirements otherwise applicable under section 8(c) of the Shipping Act of 1984, 46 U.S.C. § 1707(c). The Commission's present exemption, for the first time, allows NVOCCs to offer Service Arrangements to shippers, that is, confidential shipping contracts similar to Service Contracts offered by vessel operators under the terms of section 8(c). 69 Fed. Reg. 75850 (December 20, 2004).

The Commission's NPRM proposes to revise the present exemption in a manner that would allow NVOCCs, and shippers' associations with NVOCC members, to act as shipper parties in NVOCC Service Arrangements, as described in the Commission's regulations at 46 C.F.R. Part 531. As discussed below, the United States Department of Transportation ("DOT" or "Department") fully supports the proposals set forth in the NPRM and urges the FMC to adopt the proposed amendments to its regulations.

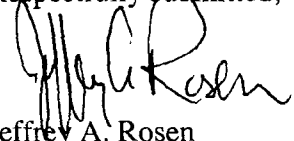
DOT welcomed the Commission's recent final rule exempting NVOCCs from tariff publication and adherence requirements to the extent necessary to allow those carriers to enter into confidential shipping arrangements to the same extent vessel operating carriers may under the 1984 Act. Thus, the Department noted in its September 30, 2004 Supplemental Comments that such an exemption would institute a "level playing field" approach, in which the same obligations currently imposed on vessel operators when they enter into service contracts would be imposed on NVOCCs under an exemption allowing them to enter into confidential shipping arrangements." September 30, 2004 DOT Supplemental Comments at 3.

The NPRM proposes to eliminate one remaining aspect of NVOCC Service Arrangements that is out of step with the concept of a level playing field: under Part 531 NVOCCs, when acting as shippers, currently lack the freedom that other shippers have to collectively seek shipping services through shipping associations. The Department understands that the Commission's restriction on such activity was originally prompted by a concern as to the possible application of the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Tucor, 189 F.3d 834 (9th Cir. 1999), where the court held that concerted activities among NVOCCs related to the foreign inland provision of services are exempt from antitrust exposure under section 7(a)(4) of the 1984 Act, 46 U.S.C. § 1706(a)(4). In precluding NVOCCs from entering into collective arrangements as shippers, the Commission sought to ensure that the holding in Tucor would not subsequently be expanded in a manner that shielded such arrangements from antitrust purview under section 7(a)(2) of the Act, 46 U.S.C. § 1706(a)(2).

But as the Department of Justice observed in its supplemental comments in the prior proceeding, Tucor is likely incorrectly decided, and in any event “provides no support for a claim that exempting NVOCCs from tariff publication requirements when they enter into [NVOCC Service Arrangements] would exempt agreements among NVOCCs from the antitrust laws pursuant to Section 7(a)(2)” DOJ Supplemental Comments of December 3, 2004 at 3. DOJ at that time urged that in lieu of restricting such activities the Commission should rather make it clear “that it does not contemplate granting such . . . immunity.” Id. at 4. The FMC’s NPRM, at 2, now endorses the same view. We also agree with the Commission’s observation that “shippers’ associations function only as buyers’ collectives, and it is unlikely that shippers associations with NVOCC members purchasing space pursuant to [NVOCC Service Arrangements] would effectively coordinate their resale of that space under the auspices of a shippers’ association.”

Accordingly, DOT urges the Commission to finalize the proposed amendment to Part 531. Allowing NVOCCs, in their role as shippers, to collectively seek transportation services will predictably enhance competition without detriment to commerce and will further level the playing field by eliminating a prohibition that is not imposed on shippers that are beneficial owners of cargo.

Respectfully submitted,



Jeffrey A. Rosen
General Counsel

August 23, 2005